

JURISDICTIONAL STATEMENT.

1. Jurisdiction of this Court is conferred by and provided for under the provisions of Judicial Code, Sec. 240 (a), as amended by Act of February 13, 1925, 43 Stat., 938 (28 U. S. C. A., Sec. 347 (a)).

2. The proceedings in question were instituted in the court below, under the following Statutes:

An Act to facilitate the prosecution of works projected for the improvement of rivers and harbors, approved April 24, 1888, 25 Stat. 94.

An Act authorizing the construction, repair and preservation of certain public works on rivers and harbors and for other purposes, approved July 3, 1930, 46 Stat. 918.

Public Resolution No. 10, Seventy-second Congress, approved February 24, 1932, 47 Stat. 57.

An Act authorizing the construction, repair and preservation of certain public works on rivers and harbors and for other purposes, approved August 30, 1935, 49 Stat. 1028.

3. The date of the judgment or decree to be reviewed is October 11, 1943 (R. 278).

Petition for rehearing was denied November 4, 1943 (R. 293).

4. Jurisdiction is invoked and rests upon the following propositions, to wit:

(a)

The decision of the Circuit Court of Appeals that Petitioners had no title, interest or estate in the property condemned raises a substantial federal question, and the deci-

sion is in conflict with the Fifth Amendment and the applicable decisions of this Court and the settled weight of authority, because Petitioners' rights in the property condemned constituted private property within the meaning of the Fifth Amendment, for which, if taken or damaged, compensation must be paid.

International Paper Co. v. United States, 282 U. S. 399.

Duckett & Co. v. United States, 266 U. S. 149.

Pumpelly v. Green Bay Company, 13 Wall. 166.

United States v. Lynah, 188 U. S. 445.

United States v. Welch, 217 U. S. 333, 339.

Monongahela Nav. Co. v. United States, 148 U. S. 312.

United States v. Wheeler Township (C. C. A. 8), 66 F. (2d) 977.

(b)

The decision of the Circuit Court of Appeals that there was no "taking" of petitioners' property in this condemnation, is clearly in violation of the Fifth Amendment, and erroneous in the light of the decisions of this Court and the settled weight of authority. "Just compensation" includes both compensation and damages. Depreciation of or damage to an easement, use or franchise in property is just as much a taking thereof as the taking of the tangible, corporeal property, and it is of no consequence in whom the fee of the property is vested.

United States v. Miller, 317 U. S. 369.

Monongahela Nav. Co. v. United States, 148 U. S. 312.

Pumpelly v. Green Bay Company, 13 Wall. 166.

United States v. Lynah, 188 U. S. 445.

United States v. Wheeler Township (C. C. A. 8),
66 F. (2d) 977.

United States v. Chicago, B. & Q. R. Co. (C. C. A.
8), 82 F. (2d) 131.

(c)

The holding of the Circuit Court of Appeals that the "St. Paul" had not proved its damages, and that its damages were consequential and not proximate, results from a plain misunderstanding of the prohibition of the Fifth Amendment. "Just compensation" means the actual pecuniary loss or hurt sustained and need not be established by any set formula. The rule that damages are consequential and nonrecoverable where they result from lawful Governmental action, or are claimed in respect to property wholly disconnected from the property taken, has no application in these cases.

United States v. Miller, 317 U. S. 369.

Monongahela Nav. Co. v. United States, 148 U. S.
312.

Pumpelly v. Green Bay Company, 13 Wall. 166.

United States v. Lynah, 188 U. S. 445.

United States v. Wheeler Township (C. C. A. 8),
66 F. (2d) 977.

United States v. Chicago, B. & Q. R. Co. (C. C.
A. 8), 82 F. (2d) 131.

(d)

The decision of the Circuit Court of Appeals awarding the Rock Island that part of the cost of repairs, embraced in the award, which the Rock Island does not have to pay, but which the St. Paul does have to pay in cash results in the unjust enrichment of the Rock Island and the infliction of a pecuniary loss upon the St. Paul, despite the Fifth

Amendment, and disregards the settled general law that apportionment of a condemnation award is an equitable proceeding and rival claimants must be required to do equity.

Turner v. Woodard (C. C. A. 1), 259 Fed. 737.

Cobo v. United States (C. C. A. 6), 94 F. (2d) 351.

United States v. Klink, et al. (D. C. Wyo.), 3 F. Supp. 208.

Law v. Chicago Sanitary District, 197 Ill. 523, 64 N. E. 536.

State v. Lewis County, 80 Wash. 417, 141 Pac. 906.

QUESTIONS PRESENTED.

The following questions are presented on the Record and raised by the petition:

Whether the Circuit Court of Appeals allowed petitioners' private property to be taken from them for a public use without just compensation, and denied to petitioners the guarantee of the Fifth Amendment, because:

- (1) It held that petitioners had no title, interest or estate in the property condemned, entitling them to be heard in a condemnation suit (R. 274 and 275);
- (2) It held that petitioners' property had not been "taken" or "damaged" (R. 277 and 278);
- (3) It held that petitioners had failed to prove their damages and that their damages were consequential and not proximate (R. 277);
- (4) It denied an equitable apportionment of the condemnation award (R. 278).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRITS.

Petitioners ask that writs of certiorari issue in these cases for the following reasons and in order to review the following matters:

1. The decisions below deny to petitioners the rights guaranteed to them under the Fifth Amendment to the Constitution of the United States, in that they violate the prohibition contained in the Fifth Amendment against taking private property for public use without just compensation.

2. The decision of the Circuit Court of Appeals that the St. Paul had no easement or possessory estate in this railroad, entitling it to be heard in a condemnation suit, is erroneous and in violation of the Fifth Amendment and the well settled law of Eminent Domain, as well as controlling decisions of this Court. In so deciding, the Circuit Court erroneously held that the St. Paul's rights were merely contractual, and that it had no conveyance or grant from the Rock Island. This is at plain variance with the Record, and resulted from the Circuit Court's acceptance of three cases (two connected cases from this Court and one from the Supreme Court of Illinois), as ruling the point, which cases are not in point and not authoritative on this issue in the cases at bar.

3. "Just Compensation" under the Fifth Amendment includes "damages" to property as well as the "taking" of property. The holding of the Circuit Court that the St. Paul's property was not "taken" by the condemnation in these cases, within the purview of the Fifth Amendment, is plainly erroneous. The Circuit Court decided in its opin-

ion that the St. Paul is still enjoying the right of use acquired under the contract (Indenture with Rock Island, dated Aug. 1, 1901), in all respects as it did before the condemnation proceeding. The fact is that the condemnation produced damages requiring repairs to this railroad in the sum of \$127,539.00, of which sum the St. Paul has to pay \$59,104.00 out of its pocket in cash. The existence of this loss demonstrates that the St. Paul's property rights were "taken" or "damaged" in this condemnation.

4. In holding that the St. Paul's damages in this condemnation were consequential and not proximate, and that the St. Paul had failed to prove its damages, the Circuit Court was misled by its conclusions on the St. Paul's property rights into a clear departure from the requirement under the Fifth Amendment that just compensation "means the full and perfect equivalent in money of the property taken" and that the person damaged "is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." The condemnation inflicted an expense burden on the St. Paul for which it has to respond in cash and which it would not have borne except for the condemnation. Unless the St. Paul is exonerated from this loss, it is denied just compensation under the Fifth Amendment.

5. The decision below unjustly enriches the Rock Island and denies the St. Paul's constitutional right to an apportionment of the award in the registry of the Court on settled principles of equity.

Wherefore, your petitioners respectfully pray that writs of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all pro-

ceedings in the case numbered and entitled on its docket, No. 12586 Civil, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, *et al.*, Appellants, *vs.* The Chicago, Rock Island and Pacific Railway Company, *et al.*, Appellees, and in the case numbered and entitled on its docket, No. 12587 Civil, The Chicago, Rock Island and Pacific Railway Company, *et al.*, Appellants, *vs.* Chicago, Milwaukee, St. Paul and Pacific Railroad Company, *et al.*, Appellees, and that the final order, judgment and decree of the United States Circuit Court of Appeals for the Eighth Circuit in each of said cases may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY, *ET AL.*,

By.....

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Attorneys for Petitioners.

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Of Counsel.